NO. 21633

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. GOLLAHER, et al.,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

FILED
FEB 7 1968
WM. B. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

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I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

On March 17, 1966, the Federal Grand Jury for the Southern District of California returned an indictment in fifteen counts, naming as defendants the appellants, Robert E. Gollaher ("Gollaher" herein) and Gollaher Construction, Inc., as well as Evelyn E. Barbee.

Count One of the indictment, the only one of the fifteen counts which charged a conspiracy in violation of Title 18, United States Code, Section 371, alleges that the three named defendants,

together with eight named unindicted co-conspirators and others to the grand jury unknown, conspired to make false statements to the Veterans Administration ("VA" herein) and to the Federal Housing Administration ("FHA" herein) both agencies of the United States. These false statements were alleged to be in violation of Title 18, United States Code, Section 1001 (as to statements made to the VA) and of Title 18, United States Code, Section 1010 (as to statements made to the FHA). The gist of the conspiracy was that Gollaher instructed defendant Barbee, who was his employee, to find persons, veterans and others, qualified to purchase homes with borrowings subject to loan guarantees from the VA or to mortgage insurance issued by the FHA. These borrowers would then be induced falsely to certify to the respective agencies that they intended to purchase from Gollaher, and thereafter to occupy, those homes; these qualified borrowers would also falsely certify that they had made a down payment; such qualified borrowers who actually applied to the VA and FHA for loans guarantees and mortgage insurance, never intended to purchase or occupy the homes, and never actually made down payments on them; and the true intended purchasers and occupants of the homes were other persons, whose existence was concealed from the VA and the FHA and who would not have qualified for loan guarantees or mortgage insurance by the standards set by those agencies for prospective borrowers. The false statements were transmitted, in the form of VA forms 26-1802 and FHA forms 2004-C and deposit receipts, to the respective agencies by Gollaher and defendant Barbee; the transmittals were made

through either of two financing agencies: T. J. Bettes Company and Central Securities Mortgage Company.

Count Two charged a violation of Title 18, United States Code, Section 1010, in that the three named defendants made a specific false statement to the FHA, by submitting to the FHA a deposit receipt which falsely stated that one of Gollaher's companies had received from Lloyd and Arlene McDaniel, prospective home purchasers, the sum of $400 on account of the purchase price of a home located at 5144 East Lamona, Fresno.

Count Three charged a violation of Title 18, United States Code, Section 1001, in that the three defendants submitted to the VA a form 26-1802 which falsely stated that Richard Hall Holt, a veteran, intended to purchase and occupy a home located at 5155 East Lamona, Fresno, and for that purpose had paid a deposit of $25.

Count Four charged the three defendants with submitting to the VA a deposit receipt which falsely stated that Richard and Eleanor Holt had made a deposit on account of purchase price of $25 to one of Gollaher's companies in connection with the purchase of property located at 5155 East Lamona, Fresno, all in violation of Title 18, United States Code, Section 1001.

Count Five charged the three defendants with submitting to the VA a form 26-1802 which falsely stated that Lloyd V. McDaniel, a veteran, intended to purchase and occupy a home located at 4226 North Pleasant Avenue, Fresno, and for that purpose had paid a deposit of $25, all in violation of Title 18, United States Code,

Section 1001.

Count Six charged the three defendants with submitting to the VA a deposit receipt which falsely stated that Lloyd and Arlene McDaniel had made a deposit on account of purchase price of $25 to one of Gollaher's companies in connection with the purchase of property located at 4226 North Pleasant Avenue, Fresno, all in violation of Title 18, United States Code, Section 1001.

Counts Seven through Fifteen similarly allege false statements made by the three defendants to the VA and FHA. Inasmuch as there was no verdict as to these counts at the trial below [R. T. 1436] [1] and they are not at issue in this appeal, they are not summarized or quoted here.

On October 13, 1966, defendant Evelyn E. Barbee entered a plea of guilty to Count Two of the indictment. Appellants pleaded not guilty to all counts on October 18, 1966, and jury trial commenced at Fresno on October 18, 1966 and continued to November 4, 1966, when the jury returned a verdict of guilty against appellants on Counts One through Six of the indictment.

On December 12, 1966, after the court denied a motion for a new trial, judgment of conviction was entered against appellants on Counts One through Six of the indictment. At the same time, defendant Gollaher was sentenced to a term of two years imprisonment on each of the six counts, to run concurrently, and was further sentenced to pay a total fine of $30,000. One year of the prison

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[1] "R. T." refers to the Reporter's Transcript herein.

sentence was provided to be suspended in the event Gollaher paid the fine in full within one year. Appellant Gollaher Construction, Inc. was sentenced to pay a fine of $6,000.

Appellant filed a timely notice of appeal on December 21, 1966.

Jurisdiction of the District Court for the Southern District of California, Northern Division, was based on Title 18, United States Code, Sections 371, 1001, 1010, and 3231.

Jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294(1).

II

STATUTES INVOLVED

Title 18, United States Code, Section 1001, provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 1010, provides:

"Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

Title 18, United States Code, Section 371, provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of

> such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

III

QUESTIONS PRESENTED

1. Is the question of whether Gollaher was improperly denied a right to the presence and advice of counsel at the Grand Jury proceeding properly before this Court?

2. Did the proceedings below deprive appellants of their rights not to be twice punished or twice placed in jeopardy on account of the same offense, or of their right not to be cruelly or unusually punished?

3. Does the record herein show that the Government's witnesses at the trial below, or any of them, were coerced into testifying unfavorably against appellants?

4. Did the trial court err in admitting evidence that some of the home sales, infected by and resulting from false statements made by appellants, resulted in financial loss to the

Government and/or to some of the purported purchasers?

5. Did the trial court err in refusing to permit inspection by defense counsel of certain FHA documents and of the transcript of grand jury testimony given by persons not called as witnesses at the trial?

6. Did the trial court err in refusing to find as a matter of law that Counts Four and Six of the indictment failed to allege a false statement sufficient, if proved, to support a conviction for violation of Title 18, United States Code, Section 1001?

7. Is the evidence sufficient to sustain the judgment of conviction against Gollaher Construction, Inc., a corporation?

8. Did the trial court in imposing sentence on appellants improperly consider appellants' refusal to admit guilt at the time of sentencing?

9. Did the trial court prejudicially err in overruling objections to leading or otherwise objectionable questions asked by Government counsel at the trial?

IV

STATEMENT OF FACTS

At the time of his trial in the court below, Robert E. Gollaher had been a licensed general contractor in the State of California since approximately 1950 [R. T. 988]. In northern California alone, he was responsible for the construction of about $15,000,000 worth of homes [R. T. 989]. During the years of his

occupation as a builder, he frequently dealt with the FHA and VA, causing applications for loan guarantees and mortgage insurance to be processed and presented to those agencies on behalf of prospective borrowers who wished to purchase his homes; in general, his relations with those agencies were good [R. T. 990]. From November of 1961, Gollaher did business through three corporations: appellant Gollaher Construction, Inc.; Design Homes by Robert E. Gollaher, Inc., and G & B Construction, Inc. [R. T. 991]. During 1962 and 1963, Gollaher did business from four locations in the Fresno area [R. T. 992].

During the early part of 1962, Gollaher hired Evelyn E. Barbee [R. T. 201, 1012] as an employee. Her duties were those of receptionist, secretary, and processor of the "paperwork" on purchase money loans [R. T. 202]. Her salary at the beginning was $90 per week [R. T. 202].

During the course of Mrs. Barbee's employment with Gollaher, in 1962 and 1963, there came a time when Mrs. Barbee was aware of a practice whereby false documents were being submitted by the Gollaher organization to the VA and FHA [R. T. 202]. This time was shortly after Mrs. Barbee began her employment [R. T. 203]. A part of Mrs. Barbee's duties was to prepare "loan packages", documents obtained from a mortgage company, covering loans as to which application would be made to the VA and FHA, and to have these signed by prospective purchasers [R. T. 219]. Gollaher had instructed Mrs. Barbee during the summer of 1962 that, when a prospective home purchaser was found unable to

qualify for financing, she was to seek a veteran who had not used his eligibility for VA home loan guarantees, and to have such a veteran complete a "loan package", including deposit receipt and certificate of eligibility, showing himself as the prospective purchaser and occupant of the house [R. T. 220-221, 251, 254, 258-259]. In return for the use of their eligibility, these veterans would receive the sum of $300, sometimes in cash and sometimes in the form of a check signed by Gollaher [R. T. 217-218]. These veterans did not intend to move onto the property [R. T. 219]. These "loan packages" were submitted by Mrs. Barbee to a mortgage company and thence to the VA [R. T. 26-27].

During the spring of 1962, Richard Hall Holt held a conversation with Gollaher [R. T. 455]. During this conversation, and during successive weeks, Gollaher proposed to Holt that the latter should use his GI eligibility to put a non-veteran into one of Gollaher's homes. Gollaher offered Holt $300 for the use of his VA Guarantee rights, and told Holt that this was a normal and common practice [R. T. 456]. Holt agreed, and signed a deposit receipt and an application for loan and for VA loan guarantee (See Exhibits 1-B and 1-C), falsely certifying that he intended to occupy the home at 5155 East Lamona, Fresno, and had paid $25 as a deposit on the home [R. T. 458-459]. Gollaher himself also signed this deposit receipt, for the seller [R. T. 1067]. Holt received $300 for the use of his VA rights, probably from Gollaher's brother-in-law and employee, Lloyd McDaniel [R. T. 459]. Gollaher told Holt not to tell anyone the true consideration for the $300, but to say it was

payment for materials sold by Holt, who was in the lumber business, to Gollaher [R. T. 457]. Mrs. Barbee handled the paperwork on the Holt transaction [R. T. 457]. The Holt application was subsequently filed with the VA [R. T. 26-27]. (The Holt transaction underlies Counts Three and Four of the indictment herein.)

Gollaher's brother-in-law and employee, Lloyd McDaniel, figured as purported purchaser in at least two home purchase transactions with Gollaher. McDaniel was employed by Gollaher approximately from January 1962 to October 1963, to do estimating, cost accounting and general office work [R. T. 702]. During 1962, under date of June 10, 1962, McDaniel at Gollaher's instigation [R. T. 705] signed an application for a loan including an application for FHA mortgage insurance (See Exhibits 8-B-1 and 8-A-3); on the latter application and on a deposit receipt which he signed, McDaniel falsely stated that he had made a deposit on the purchase price of a Gollaher home in the amount of $400 [R. T. 703]; this home was located at 5144 East Lamona, Fresno. In fact Gollaher himself furnished the down payment for this house [R. T. 705]. McDaniel's application was subsequently received by the FHA [R. T. 92]. In addition to her work with the VA Mrs. Barbee submitted to a lending institution, for transmittal to the FHA, this deposit receipt signed by Lloyd McDaniel, which falsely stated that McDaniel had made a down payment on the home which he was buying from Gollaher's organization [R. T. 237-238]. This transmittal occurred in June of 1962 [R. T. 92]. In July of 1962, after the Gollaher organization had submitted this application for loan to

the T. J. Bettes Company, a lending institution, Gollaher told McDaniel that he had resold the home and that McDaniel and his wife should not move into it [R. T. 706].

Lloyd McDaniel also submitted an application in connection with a second home, located at 4226 North Pleasant, Fresno, under date of August 24, 1962. In that instance, Gollaher told McDaniel that if the latter would allow Gollaher to make use of McDaniel's eligibility for VA loan guarantee, Gollaher would see that McDaniel was paid $300 [R. T. 708]. McDaniel signed an application for VA loan guarantee, which falsely stated that he intended to occupy the home at 4226 North Pleasant and also falsely stated that he had made a deposit in the amount of $25 toward the purchase of that home (See Exhibits 2-D and 2-E) [R. T. 708-709]. After this application was submitted by the Gollaher organization to the VA, Gollaher never paid McDaniel the $300 he had promised [R. T. 710]; ultimately McDaniel was held responsible for a deficiency following foreclosure on this home, in the amount of $1,029.27 [R. T. 711]. At the time when McDaniel's VA loan application was processed for Gollaher by Mrs. Barbee, Gollaher told Mrs. Barbee to process the loan through Central Securities Mortgage Company rather than T. J. Bettes Company, since the latter company had just processed the FHA loan for McDaniel and might be suspicious that McDaniel was applying for another loan so soon [R. T. 254-255]. (The McDaniel transactions underlie Counts Two, Five and Six of the indictment herein.)

At the trial below, Gollaher himself took the stand. He

testified that the down payment on the home at 5144 East Lamona, which he admitted he himself made on behalf of Lloyd McDaniel, was a wedding gift to McDaniel and his wife [R. T. 1068], rather than a payment made by Gollaher to induce the FHA to insure the mortgage on that home. Gollaher also testified that he did not agree to purchase the veterans' entitlements of Richard Holt and McDaniel and had no knowledge of those transactions [R. T. 1070, 1039-1040].

V

ARGUMENT

A. THE QUESTION OF WHETHER GOLLAHER WAS IMPROPERLY DENIED A RIGHT TO THE PRESENCE AND ADVICE OF COUNSEL AT THE GRAND JURY PROCEEDING IS NOT PROPERLY BEFORE THIS COURT.

The gist of appellants' first argument is stated at page 33 of their brief, wherein they argue:

> "Calling appellant Gollaher before the federal grand jury while he was a de facto defendant, nullified the entire proceedings . . . Interrogating him before the grand jury without counsel present violated his rights under the Sixth Amendment. Prejudice is shown by the fact that his testimony before the grand jury was used to impeach him at trial and was used as affirmative evidence."

It has long been clear that a potential defendant -- often termed the "subject" of a grand jury investigation -- may be subpoenaed to testify before the grand jury that may subsequently indict him, and that such a procedure does not violate the Fifth Amendment. In United States v. Winter, 348 F. 2d 204 (2nd Cir. 1965), cert. denied 382 U. S. 955, the Second Circuit stated:

> "To suggest that once an individual is named by witnesses before a grand jury under circumstances which may lead to his indictment he thereby automatically gains immunity from subpoena would denude that ancient body . . . of a substantial right of inquiry."
>
> 348 F. 2d at 207.

And see, United States v. Scully, 225 F. 2d 113, 116 (2nd Cir. 1955).

Indeed, a potential defendant may be subpoenaed before the grand jury which may indict him even if he has previously been arrested on a warrant charging the same offense as that under investigation by the grand jury.

United States v. Cleary, 265 F. 2d 459 (2nd Cir. 1959), cert. denied 360 U. S. 936.

In this case, of course, Gollaher had not been arrested on a warrant, or arrested at all, on the charges under investigation by the grand jury. In fact he was only one of several persons, including Mrs. Barbee who was subsequently indicted, who were under investigation in connection with VA and FHA frauds in Fresno.

But appellants contend that the foregoing rules have been negated by the holding of the United States Supreme Court in Miranda v. Arizona, 384 U. S. 436 (1966). They contend in essence that, following Miranda, a potential defendant appearing before a grand jury is to be considered the focus of suspicion while he is in the grand jury room, that interrogation by the grand jury is in fact and in effect in-custody interrogation, and that such a potential defendant is therefore entitled to have counsel with him in the grand jury room during interrogation. Gollaher was not, of course, afforded such presence of counsel. Appellants cite no authority for these propositions, except for Miranda itself, nor do they contend that Gollaher was not warned of his rights not to make a statement.

Although it would undoubtedly be instructive to consider these arguments of appellants, they are not material to any issue on this appeal. For it is not true, as appellants urge, that the effect of a violation of the Miranda rules, if they were violated, is to nullify any subsequent proceedings based upon the same subject matter as the illegal interrogation. Rather, the effect is only to exclude from evidence any statements made in a context violative of the rules.

Miranda v. Arizona, 384 U. S. 436 at 445 (1966).

It is true that Gollaher made statements to the grand jury in connection with the subject matter of the later indictment, and that these statements were used by the Government counsel below on cross-examination after Gollaher took the stand to testify at his own trial. They were used to impeach Gollaher, in a fairly

extensive manner [R. T. 1081-1083; 1135-1136]. The record shows that defense counsel at no time objected to the introduction of these statements on the basis that they were elicited in violation of the Miranda rules. The only objection by defense counsel to the admission of these statements was made on the basis that some of them were conclusionary [R. T. 1082, 1083]; this objection was overruled by the trial judge. Nor did appellants file a pretrial motion to suppress Gollaher's statements.

Not having objected or preserved any objection to the admission of Gollaher's statements before the grand jury at trial, appellants are foreclosed on appeal from raising the issue.

> Billeci v. United States, 290 F.2d 628
> (9th Cir. 1961);
> Fraker v. United States, 294 F.2d 859
> (9th Cir. 1961);
> Ramirez v. United States, 294 F.2d 277
> (9th Cir. 1961);
> O'Neal v. United States, 310 F.2d 175
> (9th Cir. 1961).

Moreover, there is no allegation in appellants' brief or elsewhere that any of the Government's evidence other than Gollaher's statements themselves were the product of the questioned interrogation.

Although Rule 52(b) permits an appellate court to recognize plain error to which no objection was made below, this is within the discretion of the court, which here should not be exercised in appellants' favor.

Gilbert v. United States, 307 F.2d 322
(9th Cir. 1962).

B. THE PROCEEDINGS BELOW DID NOT DEPRIVE APPELLANTS OF THEIR RIGHTS NOT TO BE TWICE PUNISHED OR TWICE PLACED IN JEOPARDY ON ACCOUNT OF THE SAME OFFENSE, OR OF THEIR RIGHT NOT TO BE CRUELLY OR UNUSUALLY PUNISHED.

Appellants argue that, prior to trial on the indictment herein, they were as licensed general contractors engaged in the development of a tract of about 400 homes in the area of San Jose, California (Appellants' Brief, 45-46). They state that the VA on December 23, 1965 so acted as to deprive them of a livelihood, in that the VA then advised appellants that the VA would refuse to appriase this project, which meant that VA loan guarantees would not be available to purchasers of homes in the project. As a result of this action, appellants contend, they sustained a loss of nearly $1,500,000 on the project. Appellants claim that this action by the VA constituted the imposition of a criminal penalty for the acts alleged in the indictment, and that the trial below subjected appellants to double jeopardy and double punishment.

The question arises, whether appellants' suspension by the VA can be deemed a criminal sanction. The appellee submits that the suspension was clearly civil and remedial, not criminal, in character.

It should be noted that the VA acted pursuant to authority

granted the Administrator of Veterans Affairs in Title 38, United States Code, Section 1804(b), which provides in substance that the Administrator may refuse to appraise any dwelling or housing project owned, sponsored, or to be constructed by a person identified with housing previously sold to veterans as to which it is ascertained that the methods or practices pursued in relation to the marketing of such properties were unfair or unduly prejudicial to veteran purchasers.

The courts have made a clear distinction between those civil, remedial actions which are brought primarily to protect the Government from financial loss, and actions intended to authorize criminal punishment to vindicate public justice. Only the latter subject a defendant to "jeopardy" in the constitutional sense.

Helvering v. Mitchell, 303 U.S. 391, 399 (1937);
United States ex rel. Marquis v. Hess,
317 U.S. 537, 549 (1942).

The Supreme Court stated in the Helvering case:

> "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense. The question for decision is thus whether . . . the statute in question . . . imposes a criminal sanction. That question is one of statutory construction." 303 U.S. at 399.

A reading of Title 38, United States Code, Section 1804(b), reveals that it does not impose a criminal sanction but merely authorizes a remedial sanction, in order to protect veteran purchasers from unfair and overreaching practices by developers.

The cases cited by appellants in support of their position do not support the contention that the VA's action was such as to impose a criminal sanction. In re Nielsen, 131 U. S. 176 (1889) is a double jeopardy case wherein the Supreme Court held that a conviction for unlawful cohabitation bars a subsequent adultery prosecution: both actions clearly imposed a criminal sanction. In re Snow, 120 U. S. 275 (1887) holds that three charges for unlawful cohabitation are deemed to constitute but one crime. Grafton v. United States, 206 U. S. 333 (1907) deals with double jeopardy as then applied in the military courts.

Appellants urge that they have been deprived of their livelihood by the VA action, and that this in itself constitutes punishment. Ex Parte Garland, 71 U. S. 333 (1866) and Cummings v. Missouri, 71 U. S. 277 (1866) deal with bills of attainder and ex post facto laws, not with double jeopardy. Moreover, the assumption that appellants were excluded from a profession or avocation of life is clearly fallacious. There is no allegation that the VA did, or had the power to, affect appellants' licenses as general contractors, and general contracting was their business. It cannot fairly be said that Gollaher was deprived of his livelihood simply because the VA refused to appraise one of his housing developments. Gollaher, moreover, had no vested right to have his property appraised by

[illegible]

[illegible]

[illegible]

[illegible]

the VA (See 38 U.S.C. §1804(b)).

C. THE RECORD HEREIN DOES NOT SHOW THAT THE GOVERNMENT'S WITNESSES AT THE TRIAL BELOW, OR ANY OF THEM, WERE COERCED INTO TESTIFYING UNFAVORABLY TO APPELLANTS.

Appellants contend that three of the Government's trial witnesses, Evelyn Barbee, Lloyd McDaniel and Charles Barboza, were "coerced" by Government counsel and agents of the FBI at the time of their appearances before the grand jury. From this they reason that the trial testimony of these witnesses should have been excluded.

To begin with, the statements made by these witnesses to the grand jury, which are alleged to be the product of "coercion", were used at trial by the defense in an effort to impeach the witnesses. Having introduced these statements at trial, appellants are now seeking to show they were the products of coercion, an obviously improper procedure. There is no allegation that the testimony given months later at trial was itself coerced, although appellants do argue that if the witnesses had changed their grand jury testimony at trial they would have been subject to prosecution for perjury.

In any case, no coercion of these witnesses at any time is shown by the record. The alleged instances of coercion cited by appellants appear to be the following, all of which occurred at or before the time of the grand jury testimony in 1965 and 1966

(Appellants' Brief, 17-27).

1. FBI agents unsuccessfully sought an interview with Mrs. Barbee late in 1964 and in January of 1965, on several occasions;

2. Mrs. Barbee was told by Government counsel that her assistance, if any, to the Government would be made known to the court;

3. Mrs. Barbee conferred with the U. S. Attorney;

4. Charles Barboza was warned of the penalties of perjury;

5. Lloyd McDaniel was questioned by the FBI and gave a statement (which was never used at the trial);

6. Lloyd McDaniel changed his testimony before the grand jury, implicating Gollaher, after he was told by Government counsel that in his opinion McDaniel had previously lied and after Government counsel raised the possibility that his relatives, including his wife and his infirm parents, might be called to testify before the grand jury.

The foregoing reflects no deprivation of these witnesses' rights. The Government has already shown (See part 1 of Argument, supra) that a prospective defendant may properly be subpoenaed to testify before the grand jury. The supposed "coercion" of these witnesses was nothing more than a fair, even though persistent, effort by the grand jury to elucidate from reluctant witnesses the truth about Gollaher's activities.

The case law does not support appellants here. In the case

of United States v. Wolfe, 307 F. 2d 798 (7th Cir. 1962), the appellant contended for the first time on appeal that the Government's principal trial witness, Ballinger, was a victim of "inhumane coercion" by investigating officials when she gave a statement incriminating defendant subsequent to her arrest. It appears that Ballinger testified that she was in custody for three days following her arrest, during which time she had no food or drink. The Court of Appeals nevertheless decided that no deprivation of federal constitutional rights had been shown.

In the present case none of the supposedly "coerced" witnesses, Barbee, Barboza and McDaniel, was ever in custody or subjected to any physical restraint or privation or maltreatment whatever. None of their rights was abridged.

The case of Napue v. Illinois, 360 U.S. 264 (1959), cited by appellants in support of their position that the use of Barbee, Barboza and McDaniel as witnesses violated their constitutional rights, is not in point. That was a case where the prosecutor failed to correct testimony which he knew to be false, and such failure was held a deprivation of due process; here, there is no suggestion that Government counsel knew any of the testimony at trial to be false.

Other cases cited by appellants in support of their position are equally inapplicable: United States v. Flynn, 130 F. Supp. 412 (SDNY 1955) was a case, like Napue, where not coercion but false trial testimony was at issue; Turner v. Pennsylvania, 338 U.S. 62 (1949) involved admissibility not of trial or grand jury testimony

but of extrajudicial statements made by defendant's co-principals during a period of custody; Mesarosh v. United States, 352 U.S. 1 (1956) was a case where the Government asked a remand because it suspected that false testimony was given at trial by a Government witness.

If this Court should accept appellants' position, the effect would be to exclude the Government from presenting at trial the testimony of any witness who had previously been persuaded before the grand jury to change a false story and tell the truth. Such methods of persuasion, including a reminder of the perjury statute and even a threat to ask the court to compel answers, are a useful and necessary tool of the prosecutor.

D. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE THAT SOME OF THE HOME SALES, INFECTED BY AND RESULTING FROM FALSE STATEMENTS MADE BY APPELLANTS, RESULTED IN FINANCIAL LOSS TO THE GOVERNMENT AND/OR TO SOME OF THE PURPORTED PURCHASERS.

At the trial, Government counsel elicited evidence that some of the VA transactions, whereby Gollaher used the purported purchaser's VA entitlements to put other persons into possession of homes, resulted in loss to the purported purchasers, who were required to pay deficiencies after foreclosure because they were the purchasers of record [R. T. 588, 710-712]. This evidence was admitted, and its admission was altogether proper.

It is of course correct that the Government need not show financial loss to the Government, or to others, as a necessary element of the crime of violating Title 18, United States Code, Sections 1001 and 1010. And appellants argue from this, with no citation of authority whatever, that the Government should not present evidence of financial loss because of its inherently prejudicial character.

This question was considered by the Fourth Circuit Court of Appeals in the case of Gormley v. United States, 167 F. 2d 454 (4th Cir. 1948). There, the defendant was accused of falsifying war assets sales documents to show that defendant was entitled to delivery of more goods than he had paid for. The Government presented evidence that, at the time defendant paid for the goods originally contracted for, his check given in payment exceeded his bank balance and that the check was subsequently dishonored. The admission of this evidence was upheld. The Court stated (167 F. 2d at 458):

> "It is alleged that this evidence was irrelevant to the actual crime charged and tended to prejudice the minds of the jurors against the defendant. We think this evidence was admissible in order to give the jury a full picture of the whole transaction."

The check given the Government in Gormley was certainly more remote from the fraud alleged than are the deficiency losses in the present case; the latter were the natural and even necessary consequences of a fraud which put substandard credit risks in possession

of homes they could not pay for, while the Government was duped into believing that other persons, veterans, such as Richard Hall Holt, were occupying and paying for the homes.

The jury below was entitled to know the whole story of Gollaher's false statements, including their detrimental effects upon the Government and upon the purchasers of record of the homes, who had sold their VA entitlements in response to Gollaher's blandishments and were ultimately left liable for the deficiencies.

E. THE TRIAL COURT DID NOT ERR IN REFUSING TO PERMIT INSPECTION BY DEFENSE COUNSEL OF CERTAIN FHA DOCUMENTS AND OF THE TRANSCRIPT OF GRAND JURY TESTIMONY GIVEN BY PERSONS WHO WERE NOT CALLED AS WITNESSES AT THE TRIAL.

Appellants allege that they were unlawfully deprived of an opportunity to review governmental intra-agency communications pertaining to the FHA. Appellants do not contend that they were entitled to discover this material under Rule 16 of the Federal Rules of Criminal Procedure; indeed Rule 16(b) specifically provides that discovery or inspection of reports, memoranda, or other internal government documents made in connection with the investigation or prosecution of the case is not authorized. Nor do appellants contend that these documents are available to them under Title 18, United States Code, Section 3500.

If the production of these documents is required by _Brady_ v. _Maryland,_ 373 U.S. 83 (1963), it is clear that the court did not err

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> [illegible]

[illegible]

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in directing the prosecutor to make a selection of those documents, and ordering the documents sealed for this Court's inspection.

In the case of Shayne v. United States, 255 F. 2d 739 (9th Cir. 1958), this Court held it was not an abuse of discretion for a trial court to refuse a request for inspection of documents in a conspiracy prosecution charging false statements to the FHA.

In any case, these documents are now before this Court (Exhibit 38) for review. The Government submits that the documents do not contain any evidence favorable to appellants and that therefore no prejudice can be shown in a failure to disclose them at trial.

Insofar as the Government's refusal to produce the minutes of Grand Jury testimony by George Knapton and Gene Morgan is concerned, the defense was clearly not entitled to those minutes. Neither Knapton nor Morgan was called as a Government witness. Only the Grand Jury testimony of Government witnesses is available under the holding of Dennis v. United States, 384 U.S. 855 (1966), and then only upon appropriate showing of need. The purpose of the Dennis rule is to allow effective cross-examination by defense counsel of witnesses actually called by the Government. The Supreme Court stated in Dennis:

> "Because petitioners were entitled to examine the grand jury minutes relating to trial testimony of the four government witnesses, and to do so while those witnesses were available for cross-examination, we reverse the judgment below. . . ." 384 U.S. at 875.

Thus the Dennis rule does not apply.

Moreover, the witnesses Knapton and Morgan were fully available to be called as witnesses or interviewed by the defense, and the defense chose not to call them. Under the circumstances it is clear that there is no prejudice.

F. THE TRIAL COURT DID NOT ERR IN REFUSING TO FIND AS A MATTER OF LAW THAT COUNTS FOUR AND SIX OF THE INDICTMENT FAILED TO ALLEGE A FALSE STATEMENT SUFFICIENT, IF PROVED, TO SUPPORT A CONVICTION FOR VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 1001.

Counts Four and Six of the indictment allege false statements made to the VA, in the form of statements that a deposit in the sum of $25 had been received on account of the purchase price of two homes from two respective veteran purchasers (Richard Holt and Lloyd McDaniel), when such was not the case.

Both Holt and McDaniel testified that they had made these statements at Gollaher's instigation, and that the statements were false [R. T. 458-459, 709].

Appellants now contend that these two counts do not state a material fraud because the VA does not require a down payment. At the trial evidence came in that the payment of a $25 deposit would not influence the VA to accept or reject an applicant for loan guarantee [R. T. 62-63].

The Ninth Circuit has already considered, in the case of

Brandow v. United States, 268 F. 2d 559 (9th Cir. 1959) the contention that if the Government does not rely on a statement found to be false, the defendant is entitled to acquittal. In Brandow, the court quoted certain language from United States v. Quirk, 266 F. 2d 26 (3rd Cir. 1959), a case wherein the defendant was accused of causing a lending institution to submit to the VA a false application for insurance. Because the application was rejected by the VA, appellant urged that the exercise of a Government function could not have been influenced by the admitted false statements and hence that the statements were not material. The Court stated:

> "[W]e believe that the conduct Congress intended to prohibit by § 1001 was the wilful submission to federal agencies of false statements calculated to induce agency reliance or action, irrespective of whether actual favorable agency action was, for other reasons, impossible. We think the test is the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances." 268 F. 2d at 565. [Emphasis added]

In this case, the statement that $25 deposits were made was certainly found by the jury to be intrinsically capable of attaining Gollaher's end of obtaining illegal loan guarantees by deceiving the VA into believing that good faith purchasers who could and would put up money were involved. This finding should not be disturbed

on appeal, since this Court must view the evidence at trial in the light most favorable to the Government.

Glasser v. United States, 315 U.S. 60 (1942);
Noto v. United States, 367 U.S. 290 (1961);
Stein v. United States, 327 F.2d 825 (9th Cir. 1964), cert. denied 377 U.S. 970.

G. THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE JUDGMENT OF CONVICTION AGAINST APPELLANT GOLLAHER CONSTRUCTION, INC.

Gollaher Construction, Inc. was a corporation organized, along with two others, by Gollaher in 1961 to engage in the building business. It functioned as a business entity at least until November 1, 1966 [R. T. 991]. Gollaher was president of this corporation [R. T. 1082]. At his grand jury appearance, Gollaher testified that G & B Construction, Inc. and Design Homes, Inc. were subsidiaries of Gollaher Construction, Inc. [R. T. 1082]. At trial, however, Gollaher testified that Gollaher Construction, Inc. had nothing to do with the transactions charged in the indictment [R. T. 1085].

The record as a whole shows that Gollaher used the three corporations almost interchangeably. For example, employees of his performed services for Gollaher Construction, Inc. [R. T. 1086]. The check for $300 payable to Holt Lumber Company for Richard Holt's veterans entitlement apparently went through the

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Gollaher Construction, Inc. account [R. T. 1086-1087].

It seems patent that Gollaher Construction, Inc. was one of the instrumentalities by which Gollaher carried out the illegal transactions charged in Counts One through Six of the indictment. Basically, the theme runs throughout the record that all three of the corporations were no more than the three faces of Gollaher. Gollaher himself testified at the grand jury hearing that Gollaher Construction, Inc. was a parent corporation to the others; he may have meant, and the jury should be free to find, that in a non-technical sense he used Gollaher Construction, Inc. as a supervisory entity, giving through it the directions to Evelyn Barbee and other employees which underlie the indictment, and acting for it when he made his fraudulent propositions to Holt and McDaniel.

Once again, viewing the evidence most favorably to the Government, the jury's finding of guilty against Gollaher Construction, Inc. should not be disturbed.

Glasser v. United States, supra;
Noto v. United States, supra;
Stein v. United States, supra.

Moreover, Evelyn Barbee appears to have identified Gollaher Construction, Inc. as her employer, under the name "Gollaher Company" [R. T. 201]; Charles Barboza described Gollaher as owner and president of "the Gollaher Company", and Lloyd McDaniel also testified that he worked for the Gollaher Company [R. T. 702].

H. THE TRIAL COURT IN IMPOSING SENTENCE ON APPELLANTS DID NOT IMPROPERLY CONSIDER APPELLANTS' REFUSAL TO ADMIT GUILT AT THE TIME OF SENTENCING.

Appellants were sentenced on December 12, 1966. Prior to sentencing defense counsel, Mr. Earl Klein, made a statement requesting probation for Gollaher rather than imprisonment [R. T. 1475-1478]. The following colloquy then took place.

> "THE COURT: Don't you feel that probation requires that some trust be placed in Mr. Gollaher?
>
> "MR. KLEIN: Yes, and I believe he is worthy of that trust.
>
> "THE COURT: Except that he already has lied to the court under oath and how can I believe him in other aspects?"
>
> . . . .
>
> "THE COURT: I fail to see it, Mr. Klein, I'm sorry to say. Here is a man that still doesn't admit that he has violated the law. The first step toward rehabilitation is an admission of his faults, his willingness to start over and make amends."
>
> . . . .
>
> "THE COURT: I was only mentioning it with regard to probation. I don't feel that probation is indicated under the circumstances."
>
> [R. T. 1478-1485 passim.]

Thus, Gollaher refused to the end to acknowledge that he had not told the truth on the witness stand, and the court took this into account in refusing to grant him probation. This action is assigned as error by appellants.

The power of a trial court to suspend sentence and place a convicted defendant on probation is wholly within the trial court's discretion, and its exercise cannot be questioned on appeal.

Elder v. United States, 142 F.2d 199
(9th Cir. 1944).

The trial court considered Gollaher's refusal to admit his fault solely in the course of its exercise of discretion whether to suspend sentence and grant probation.

On this exact point, the Tenth Circuit ruled in the case of Williams v. United States, 273 F.2d 469 (10th Cir. 1960). There the court held that the trial court had discretion to deny probation because of the defendant's continued assertion of his innocence on a charge of detaining and secreting mail. The Court of Appeals held:

> "While the court's action in denying probation because of the defendant's continued assertion of his innocence may seem severe, the matter is one entirely for the trial court." (273 U.S. at 470.)

The action of the trial court in Thomas v. United States, 368 F.2d 941 (5th Cir. 1966), cited by appellants, is distinguishable from the present case. There, the trial court gave a longer

sentence of incarceration because of the defendant's continued assertion of innocence, and probation was not an issue.

Moreover, if the Williams and Thomas cases are in conflict, the Government urges this Court to adopt the rule in Williams as the better rule. Discretion over degrees of lawful sentencing belongs in the trial court, where the trial judge has had a chance to size up the moral attitudes and credibility of the defendant during trial.

I. THE TRIAL COURT DID NOT PREJUDICIALLY ERR IN OVERRULING OBJECTIONS TO QUESTIONS ASKED BY GOVERNMENT COUNSEL.

At trial, Government counsel cross-examined Gollaher. In the course of his cross-examination, he elicited from Gollaher the information that the latter subsequent to 1959 was associated with one James Tripp in the framing and construction of houses. The prosecutor then asked Gollaher:

> "And you knew that Mr. Tripp was convicted in this court in 1965 for filing false statements to the FHA, didn't you?" [R. T. 1080].

At this point defense counsel interrupted, and the record shows that no answer was given. If an affirmative answer had been given and allowed to stand, it is probable that the resultant error would have been harmless in view of the other, overwhelming

evidence against Gollaher.

McRaye v. United States, 163 F.2d 868
(9th Cir. 1947);

Kowalchuk v. United States, 176 F.2d 873
(6th Cir. 1949);

United States v. McClenny, 346 F.2d 125
(4th Cir. 1965).

But the objectionable question was not only unanswered, it was stricken at once by the trial court [R. T. 1081-1082]. The court carefully told the jury that the association with Mr. Tripp had no bearing on guilt or innocence. Moreover, again, in instructing the jury, the court stated that a question stricken from the record should be disregarded [R. T. 1422]. In view of all the evidence against Gollaher, the question concerning James Tripp should be deemed not prejudicial.

Appellants contend that other questions asked by Government counsel, to which objection was made were "argumentative" and leading. A review of these questions (Appellant's Brief, pp. 56-57) reveals that they are not objectionable. Rather, they are forthright inquiries concerning Mrs. Barbee's knowledge of false statements in connection with the Gollaher organization's dealings with the VA and FHA.

CONCLUSION

For the reasons stated above, the judgments of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael Heuer
MICHAEL HEUER